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THE PRESENT LEGAL STATUS OF ORGANIZED LABOR IN THE UNITED STATES

It is a far cry from a statute forbidding all combinations of workingmen to one that requires all public work of municipal corporations to be done by union labor and be paid for at union rates. Though six centuries intervened between the two enactments named, the actual change in the governmental attitude has taken place almost entirely within the past century. To review the steps in this readjustment of position and the struggles that have led up to it is, however, beside the present purpose, which is only to set forth within a modest scope such an account of some of our own more recent laws[1] and decisions as will indicate somewhat the status of labor, or rather of organized labor, in so far as such status has been made a subject of legal determination.

Besides the question of the labor unions themselves, an interesting situation is developing from the formation of employers' associations and citizens' alliances, and a unique opportunity is afforded for a study in comparative organization. The objects and methods of the associations of employers and of employees are, *mutatis mutandis,* so nearly identical that it would appear that what is allowed the one must be allowed the other, and that the same legal principles must control. So that if the labor union alone were not of sufficient importance to command attention, the entering in of this new element — or rather this revival of a very old but long dormant institution — would assuredly obtrude the question of the position and influence of industrial organizations upon the most unobservant.

Many divergent and even conflicting opinions are handed down from the bench, and the attitude of legislatures differs only less widely, but a general trend is none the less observable, and by confining our review to a very few years past a showing can be made which, while not complete, will be at least suggestive.

[1] The statutes referred to herein are to be found, with one or two exceptions in the *Tenth Special Report of the Commissioner of Labor.*

The general right to organize for the purpose of bettering his condition, leaving to him the privilege of defining with considerable liberality what shall be included in such a purpose, is allowed to the workingman by the courts of all the states, and directly by the statutes of nearly every state and by the national government. The federal statute and the laws of ten states[2] provide for the incorporation of trade unions, the Nebraska law going so far as, in effect, automatically to incorporate any local assembly of the Knights of Labor immediately on the receipt of its charter. This was doubtless intended as a favor, but the privilege of incorporation is, in general, very little prized by organized labor at present. Two other states, New Jersey and New York, provide for joint incorporations of labor unions for specific purposes.

A number of states which forbid the formation of monopolies and trusts for the control of prices specifically exempt labor organizations from their prohibitions;[3] others have modified common law or statutory conspiracy by declaring that labor combinations are not to be so classed.[4] In Pennsylvania, for instance, the right to strike when continuance in service would be contrary to the constitution, rules, or resolutions of any organization to which an employee belongs, is specifically granted, as well as the power of unions to devise and adopt ways and means to carry such regulations into effect. For such acts, prosecution for conspiracy is forbidden, the only limitation being that the regulations in question shall not conflict with the constitution of the state or of the United States; prosecution under other laws than those against conspiracy, however, is not precluded, where offenses have been committed.

Opposition of the employer to the unions is sought to be restrained by laws forbidding the requirement of any pledge or agreement on the part of the employee not to join a labor union, and prohibiting the discharge of any workman on account of such

[2] Iowa, Louisiana, Maryland, Massachusetts, Michigan, Nebraska, Ohio, Pennsylvania, Texas, Wyoming.

[3] Louisiana, Michigan, Minnesota, Montana, Nebraska, North Carolina, Wisconsin.

[4] California, Colorado, Maryland, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, Porto Rico.

membership.[5] In this connection it may be said that Illinois,[6] Kansas,[7] and Wisconsin[8] recently, and Missouri[9] at a somewhat earlier date, have, by their supreme courts, declared such laws unconstitutional as restricting the rights enjoyed by both employer and employee to terminate all engagements not controlled by contract at the will of either party, and for any reason that may appear to them good and sufficient. The Superior Court of Pennsylvania[10] took a similar view of such a law in that state, though the Supreme Court has never passed upon it; while an Ohio statute of the same kind was upheld by a court of common pleas.[11]

A statute which goes a step farther in this direction, but which has not, so far as known, been passed upon by any court, is the act of the Minnesota Legislature of 1903, making it an offense for any employer to discharge his employees by reason of their having engaged in a strike, or to seek to prevent their employment for that reason, or for a prospective employer to require of applicants for employment a written statement as to their participation in any strike.

Coming perhaps within our purview in this connection is the act of the Illinois Legislature of 1899, making it unlawful for an employer whose employees are on strike to advertise for workmen or to make any proposal or contract for their employment without stating in the advertisement, proposal, or contract that such strike is in progress. The statute-books of Montana, Oregon, and Tennessee contain similar provisions. The Legislature of Wisconsin, by its act of 1901, forbade the free public employment offices created thereby to furnish lists of persons desiring employment to employers in whose works a strike was in progress — a provision which was omitted in the superseding act of 1903, while

[5] California, Colorado, Connecticut, Idaho, Indiana, Kansas, Masachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Porto Rico, Wisconsin, United States. The United States statute relates only to railroads engaged in interstate commerce.

[6] Gillespie v. People, 58 N. E. Rep. 1007.

[7] Coffeyville Brick and Tile Co. v. Perry, 76 Pac. Rep. 848.

[8] State *ex rel.* Zillmer v. Kreutzberg, 90 N. W. Rep. 1098.

[9] State v. Julow, 31 S. W. Rep. 781.

[10] Com. v. Clark, 14 Sup. Ct. Rep. 435. [11] 30 W. L. B. 342.

a similar one was recently declared unconstitutional in Illinois.[12]

A federal court, independent of statutory provision, recently refused the prayer of a telegraphers' union for an injunction that would prohibit the discharge of its members because of their belonging to the union, on the grounds that a court could not pass upon the reasons for employment or discharge;[13] and clearly, until the parties to a contract are equally ready to submit to enforced service and enforced employment, neither can equitably ask for the enforcement of any such demand against the other.

It is maintained by the labor unions that the employment of union labor guarantees to some extent the quality of the product as well as the sanitary condition of its manufacture, and, in order that the consumer may be somewhat advised as to these points, they propose that goods of union make shall bear a label indicative of that fact. Forty states have enacted laws for the special protection of such label or trade-mark from imitation or infringement. Two states, Montana and Nevada, go so far as to provide that all public printing shall bear the union label; but if we may judge from the fate of certain city ordinances to the same effect, such laws cannot stand the test of constitutionality, since they abridge the privileges of citizens by making arbitrary discriminations between certain classes, and also exact undue sums from the taxpayer by so restricting competition as to increase the cost of the work contracted for, and are therefore against public policy.[14]

Nor can we help thinking it likely that the Nebraska statute above referred to, which restricts employment on public works to union labor, will likewise be found to be fatally at variance with the provisions of the Constitution and its amendments, which guarantee the liberties of the people as a whole; especially as we find that an ordinance of the city of Chicago, requiring that only members of labor unions be employed on public works in the city, was set aside as effecting an unlawful discrimination between citizens.[15] The well-known "open shop" discussion so recently

[12] Matthews v. People, 67 N. E. Rep. 28.

[13] Boyer v. W. U. Telegraph Co., 124 Fed. Rep. 246.

[14] Holden v. Alton, 53 N. E. Rep. 556; Marshall & Bruce Co. v. City of Nashville, 71 S. W. Rep. 815.

[15] Fiske v. People *ex rel.* Raymond, 58 N. E. Rep. 985.

before the country in the case of the Government Printing Office, and the conclusions reached in that connection by President Roosevelt, are evidence along the same lines.

Not only the union label, but also the badge, button, or other insignia of the union, is in some states safeguarded by statute from imitation or wrongful use;[16] while in some the forgery of an association card is a specific offense.[17] Still other forms of recognition of organized labor are found in statutes which provide for the naming by a trade union of a member or members of a board of arbitration to be formed for the adjustment of labor disputes in which the members of such a union are concerned;[18] in the acts of Minnesota and Missouri establishing barbers' examining boards, providing that one member of such boards shall be nominated by a barbers' union; in the recognition by a Missouri statute of the certificate of competency issued by an incorporated local association of stationary steam engineers; and in a New York statute which makes it a misdemeanor to give or offer anything of value to a duly appointed representative of a labor organization with intent to influence his acts or decisions as such representative.

The legislation above considered, authorizing the formation of unions and securing to them certain prerogatives, has for its object the protection and enlargement of the rights of organized labor as such. In some instances there is to be found embodied in such laws a provision to the effect that the privileges granted are not to be construed as authorizing or condoning any act violative of the rights of others or as affecting the law relative to unlawful assemblies, etc.

Laws aimed directly at certain acts more or less frequently practiced by organized labor are also found, representing the restrictive attitude of the state. Thus interference with employment by intimidating either employee or employer, or any union or combination of persons by which it is sought to prevent any one

[16] Massachusetts, Pennsylvania. [17] Georgia, New York, Wisconsin.

[18] Colorado, Connecticut, Illinois, Louisiana, Massachusetts, Minnesota, Missouri, Montana, New Jersey, New York, Ohio, Texas, Utah, Wisconsin, United States.

from accepting or continuing in any employment that he may choose, is a statutory offense in several commonwealths.[19] Railroad service is marked out for especial protection against interference or intimidation in some states;[20] while the abandonment of a locomotive or railroad train at any place other than its destination, in furtherance of any purpose to incite or maintain a strike, or the refusal by a railroad employee to handle cars of a road on which a strike exists, is directly legislated against in seven instances.[21]

The action of certain unions in expelling from membership those of their number who are or may become members of the national guard, while not immediately an interference with employment, is certainly an infringement on the liberties of the citizen, and also affects the opportunities for employment where unionism in any degree controls the same. Such interference is specifically prohibited in a recent statute of the state of New York, making it a misdemeanor for unions to discriminate against members or applicants for membership on account of enlistment. It can but appear, however, that the enforcement of such a law, especially in its attempt to control their attitude toward applicants for membership, will be quite difficult as against voluntary organizations.

The boycott is a weapon that is proscribed in a number of states;[22] while picketing, without which it may almost be said that a strike is foredoomed to failure, was made illegal at the last session of the Alabama Legislature.

A departure that proposes a measure of restriction upon both employers and employees is found in a very few states,[23] by which the findings of a board of arbitration are made binding on both

[19] Alabama, Connecticut, Georgia, Illinois, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Porto Rico, Rhode Island, South Dakota, Texas, Utah, Vermont, Wisconsin.

[20] Delaware, Illinois, Kansas, Kentucky, Maine, Mississippi, New Jersey, Pennsylvania.

[21] Connecticut, Delaware, Illinois, Kansas, Maine, New Jersey, Pennsylvania.

[22] Alabama, Colorado, Illinois, Indiana, Texas.

[23] Colorado, Idaho, Illinois, Indiana.

parties for a specified term, where there was an agreement to submit the case, failure to abide by such agreement being punishable as for contempt of court. Punishment may not extend to imprisonment, however, except in cases of "wilful and contumacious disobedience" in Indiana, Idaho, and Colorado, and in no case in Illinois.

A legislative idea that has thus far met with adversity during its brief career is one that proposes to classify contempts of court, considering those committed outside the court's presence as indirect and providing a jury trial for them. This provision, though "naming no names," is an obvious attempt to restrict the power of judges to proceed summarily in the punishment of violators of such injunctions as are issued in the case of strikes. A bill embodying this idea passed the Senate of the United States in 1896, but failed in the House. A statute of the same form was enacted in Kansas in 1897, only to be repealed in 1901. In Virginia a law of like tenor, enacted in 1898, was promptly declared unconstitutional by a court that declined to be fettered by such regulations;[24] a similar fate recently befell the Oklahoma statute of 1895,[25] which contained provisions for change of venue and jury trial in cases of indirect contempt. The constitution of Virginia of 1902 contains a clause authorizing the legislature to regulate the practice of the courts in this matter, a privilege which has thus far not been taken advantage of. The state of Colorado has a law, passed in 1901, providing for jury trial for contempts not committed in the presence of the court, which is probably the only one of its kind now on the statute-books of any commonwealth, though a Kentucky statute provides that no fine above thirty dollars, or penalty of imprisonment exceeding thirty hours, can be assessed for contempt without a jury trial.

This glance at legislation shows that organized labor is an element with which our lawmakers are reckoning, and that there is a growing tendency to protect it by statute in certain prescribed activities and to determine at what points these activities must stop. The common law remains, as it has been, the chief arbiter of the rights of contract and of property, whether it be of material,

[24] Carter's Case, 32 S. E. Rep. 780. [25] Smith v. Speed, 56 L. R. A. 402.

tangible form, or whether it be of a more abstract nature, as the right to control one's own labor or to choose forms and conditions of service or employment, whether these be considered with reference to single individuals or to larger numbers in the form of organizations; while the courts of equity are yet appealed to to hold in check those agencies that threaten irreparable loss and to redress wrongs that are without effective remedy at the common law.

Such at least is the theory; as to actual results, opinions differ widely. Certainly improper and indefensible injunctions have been granted by courts of equity, and with equal certainty it may be affirmed that half-hearted measures have left free the outworking of misguided impulses, or have permitted persons of criminal disposition not only to interfere with and injure trade, but also to take life in the alleged pursuit of the rights of labor. It is not to be doubted that many acts of violence have been committed during strikes by persons in no way connected with labor or with labor unions, but there is an abundance of thoroughly authenticated cases in which union men have committed known assaults of the most aggravated kind and retained good standing in their organizations. Whether courts of equity can be so hedged about by legislation on the subject of issuing injunctions as to prevent acknowledged abuses, or whether the question must be left to work itself out in the continuing adjustments of conflicting interests and demands and claims of right, is a question that is doubtless open to discussion. It is very evident that the labor organizations have largely made up their minds that legislation is required, and they show no hesitation in making out at least the preliminary requirements therefor. A bill has been repeatedly offered in Congress which has for its aim the limitation of the meaning of the word "conspiracy," and of the use of restraining orders and injunctions, in so far as the authority of Congress extends to such limitations and control, but the measure has failed as yet to receive the requisite legislative sanction.

While the writ of injunction is an ancient one, its use in the present forms of labor troubles is of comparatively recent development, and some difficulty has been experienced in the attempt to

ground it on such clearly defined foundations as to give it the cogency and effectiveness that are felt to be desirable. Where there is a contract which either employer or employee is prevented from carrying out, the matter is quite simple; but what interest has an employer in laborers whom he has never seen, and with whom he has entered into no relations of employment, even though they might enter his service but for the advice or warnings of picketing strikers? And how can a merchant declare in court that any person or persons would be beneficial customers of his but for a boycott, when such persons have no sort of agreement or custom as to such trade?

In considering questions of this nature, courts of equity have apparently concluded that there were grievances such as would warrant their action, without always being able clearly to state the grounds therefor. The situation reminds us somewhat of the mode of procedure said to have been followed in our Supreme Court, at a time when it had a chief justice of such accurate judicial instinct that he frequently formulated the proper decision in a case, requesting another member of the court, excelling in a knowledge of authorities, to support the decision by the proper references to *res adjudicata*. The trouble in the case in hand, however, has been to find the references. It was recently declared from the supreme bench of Minnesota that

> it is immaterial whether contract relations actually existed between plaintiffs and their customers at the time, for it would be just as injurious and destructive to plaintiffs' business to prevent them by such means from obtaining customers with whom they could enter into contracts as to interfere by unlawful threats and intimidation and cause existing contract relations to be broken. It is plaintiffs' business as a whole that the law protects, and not some particular transaction involved therein.[26]

A present member of the United States Supreme Court disposed of the question broadly by saying that he believed

> most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasingly complex business relations and the protection of rights can demand.[27]

A Massachusetts decision[28] declares the interference and disturb-

[26] Gray v. Building Trades Council, 97 N. W. Rep. 663.

[27] 54 Fed. Rep. 746.

[28] Sherry v. Perkins, 17 N. E. Rep. 307.

ance resulting from the conduct of a strike by organized labor and their hindering the conduct of business to be a nuisance, which statement, like the "confession of faith" of the distinguished jurist quoted above, may be in general accepted as true, though neither can be considered as a very definite or satisfactory basis of procedure.

Perhaps the nearest approach to such a statement that has come from the bench in this country is presented in the discussion of a strike case by Vice-Chancellor Stevenson, of the Court of Chancery of New Jersey,[29] who recognized the difficulty there is

> in perceiving how molestation and annoyance, not of the employees of a complainant, but of persons who are merely looking for work and may become employees of the complainant, can be erected into a legal or equitable grievance on the part of the complainant.

In the case under consideration the possible employees themselves made no complaint, nor was there such molestation as to support a common-law action of tort, as for assault or battery, or for slander. Yet that there was actual and material interference with the complainant's business was well established, and the grounds on which the court saw fit to intervene appear in the following quotation from the opinion of Vice-Chancellor Stevenson:

> The underlying right in this case under consideration, which seems to be coming into general recognition as the subject of protection by courts of equity through the instrumentality of an injunction, appears to be the right to enjoy a certain free and natural condition of the labor market, which in a recent case in the House of Lords was referred to, in the language of Lord Ellenborough, as a "probable expectancy." This underlying right has otherwise been broadly defined or described as the right which every man has to earn his living, or to pursue his trade or business, without undue interference, and might otherwise be described as the right which every man has, whether employer or employee, of absolute freedom to employ or be employed. The peculiar element of this perhaps newly recognized right is that it is an interest which one man has in the freedom of another. In the case before this court, the Jersey City Printing Company claims the right not only to be free in employing labor, but also the right that labor shall be free to be employed by it, the Jersey City Printing Company. A large part of what is most valuable in modern life seems to depend more or less directly upon "probable expectancies." When they fail, civilization as at present organized, may go down. . . . . It would seem inevitable that courts of law . . . . will discover, define, and protect from undue

[29] Jersey City Printing Co. v. Cassidy, 53 Atl. Rep. 230.

interference more of these "probable expectancies." In undertaking to ascertain and define the rights and remedies of employers and employees in respect of their "probable expectancies" in relation to the labor market, it is well not to lose sight altogether of any other analogous rights and remedies which are based upon similar "probable expectancies." It will probably be found in the end, I think, that the natural expectancy of employers in relation to the labor market, and the natural expectancies of merchants in respect to the merchandise market, must be recognized to the same extent by courts of law and courts of equity, and protected by substantially the same rules. It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market. . . . . It is, however, the right of the employer and employee to a free labor market that is the particular thing under consideration in this case. Without any regard to the rights and remedies which the molested workman may have, the injunction goes at the suit of the employer to protect his "probable expectancy" — to secure freedom in the labor market to employ and to be employed, upon which the continuance of his entire industry may depend.

While injunctions have not infrequently named labor organizations and their officers as subject to the restraint proposed, the actual recognition of the union as a body subject to penalty has occurred but rarely. One of the latest and most interesting cases of this class is from the superior court of Cook County, Ill., and presents perhaps the first instance in this country of the punishment of a labor union for contempt of court.[30]

In this case an employers' association, known as the Chicago Typothetæ, had entered into a contract with an incorporated organization of employees known as Franklin Union No. 4, with reference to a wage scale, such contract to run from April 1, 1901, to December 31 of the same year. By tacit consent the scale had remained in force for nearly two years longer than its original term, when it was declared annulled by the Franklin Union. This action was taken September 27, 1903, and on October 10, following, an injunction was procured forbidding the union, its officers, and other defendants "in any manner to interfere with, hinder, obstruct, or stop any of the business of the complainants;" also forbidding interference with employees by threats or intimidation, force or violence, or in like manner preventing persons from freely

[30] Chicago Typothetæ v. Franklin Union No. 4, *Chicago Legal News*, No. XVIII.

entering into and continuing in the service and employment of the complainants. About two months later, on the evidence adduced, which involved a number of assaults and other violent and threatening acts committed by persons who were in official positions in the union and who drew strike benefits from its treasury, Judge Jesse Holdom, of the court above named, adjudged the union guilty of contempt, assessing a fine of one thousand dollars.

While this case stands alone in some important respects, it suggests the case of Curran v. Galen,[31] in which one Curran obtained judgment for damages in a suit against the officers of an unincorporated labor organization in the state of New York under a statute authorizing such suit, the cause of complaint being that Curran was deprived of employment by the action of the union, of which he was not a member; also the cases of Parker v. Bricklayers' Union [32] and Moore v. Same,[33] in which it was held by the Ohio courts that a trade union and its agents and members were jointly liable for damages caused by combinations that injured the plaintiffs by boycotts and interference with trade. England furnishes the noted Taff Vale decision of recent date, supported by the final judgment of the House of Lords, in which a penalty of twenty-three thousand pounds was assessed against the Amalgamated Society of Railway Servants, an unincorporated union, as damages claimed by the Taff Vale Railway on account of acts of the society and its members done in furtherance of a dispute as to the terms and conditions of employment. The effect of such decisions is clearly to charge upon the union, as such, an accountability to which it has not generally been held.

Involved more or less fundamentally in these cases, and, in fact, in a large percentage of all strikes undertaken by the unions, is the question of the "open shop" already alluded to. In this connection we find the very recent case of Christensen v. People, in which the Illinois Appellate Court [34] holds that the purpose of a strike undertaken with the object of bringing about the signing of a contract by the employer to hire none but union workmen is an unlawful one, and that any contract signed under the influence of

[31] 46 N. E. Rep. 297. [32] 21 O. L. B. 223. [33] 23 O. L. B. 48.

[34] 1904. 36 *Chicago Legal News* 40.

such existing strike is voidable on account of duress. The court further says that

> the agreements in question would, if executed, tend to create a monopoly in favor of the members of the different unions, to the exclusion of workmen not members of such unions, and are, in this respect, unlawful. Contracts tending to create a monopoly are void.

This case has attracted much attention, and has been widely discussed in the labor world, the statement having been made that it involved a new doctrine which, if established, would deal to organized labor a crushing blow. Almost on the heels of this decision come others to the same effect from the Superior Court of Massachusetts sitting in Boston, from a circuit court of Wisconsin sitting in Milwaukee, and from the appellate division of the Supreme Court of New York. In none of these cases, however, has the question come before the court of last resort in the state, and the probable appeals to such courts will be watched with interest; for while there is certainly a wide field of activity and usefulness for labor organizations apart from the existence of the closed shop, made so by an enforcible contract, it can hardly be doubted that to brand as a criminal conspiracy a strike to obtain such an agreement, as was done by Judge Adams in the Christensen case, would affect in many respects the position of both parties to the struggle. The Connecticut Supreme Court,[35] on the other hand, finds in a "closed shop" contract "no provisions contrary to the criminal law of the state."

It may be noted, however, that the validity of such contracts between associations of employers and employees was passed upon more than seven years ago by the highest court of the state of New York, and they were there held to be invalid, in language no less clear and decisive than that used by Judge Adams.

The case is that of Curran v. Galen, mentioned above. Curran was discharged by his employers at the instigation of officers of a labor union in pursuance of an agreement by the company to employ only members of such union in their works, whereupon he brought suit against the union and its officers to recover damages sustained by him on account of his discharge. The defend-

[35] State v. Stockford, 58 Atl. Rep. 769.

ants acknowledged the existence of the agreement as well as the performance of the acts complained of, but maintained that they "did so solely in pursuance of said agreement, and in accordance with the terms thereof, and without intent or purpose to injure plaintiff in any way." On the point of the nature of the contract, Judge Gray, who prepared the opinion, which was unanimously supported by the court, said:

If such an agreement is lawful, then it must be conceded that the defendants are entitled to set it up as a defense to the action, forasmuch as they allege that what they did was in accordance with its terms. In the general consideration of this subject, it must be premised that the organization or the co-operation of workingmen is not against any public policy. It is proper and praiseworthy, and perhaps falls within that general view of human society which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily. But the social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend or to accomplish injury to others. Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. The candid mind would shrink from the operation of the principle contended for by the defense; for there would certainly be a compulsion or fettering of the individual glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the state.

But the closed shop does not depend for its existence upon the written or otherwise expressed agreement of the employer. The force of such circumstances as the unions well know how to create may be quite sufficient to prevent the employment of workmen whose standing has not the seal of their approval. And if we may accept as a criterion the findings in a case[36] decided in 1902 by the

[36] National Protective Association of Steamfitters, etc., v. Cummings, 63 N. E. Rep. 369.

same court that passed upon the Curran case, we shall feel sure that unionism will not become a dead issue merely because contracts for the exclusion of nonunion labor cannot be procured or enforced.

The case referred to derives additional interest from the fact that the parties thereto were rival organizations, and that the opinion of the majority of the court was prepared by Judge Parker, then chief justice of the Court of Appeals. The action was one for an injunction to restrain the members of an association of steamfitters and helpers from preventing the employment of the members of a rival association. The defendants were in affiliation with the organizations of the various building trades of the city of New York, and had refused to accept one McQueed as a member. After being rejected by the older association, McQueed had aided in the formation of the plaintiff association, whereupon the threat was made that he and his associates would be allowed no work in the city except on small jobs which the defendants did not care for, and that their organization would be driven out of existence. The method of effecting this result was to be by threatening to call out all affiliated workmen on any building on which members of the objectionable association were employed, unless they were discharged. The discharge of the complainants was thus procured in a number of instances, though the employers testified that McQueed, against whom the acts of the defendants were especially directed, was a good workman, and that, apart from the difficulties into which they were brought by the threats of the defendants, they would gladly give him employment; and it was against the continuance of this conduct on the part of the older associations that the injunction was sought.

In denying the right to such injunction, Judge Parker said in part:

> The object of such an organization of workingmen is to benefit all its members, and it is their right to strike, if need be, in order to secure any lawful benefit to the several members of the organization — as, for instance, to secure the re-employment of a member they regard as having been improperly discharged, and to secure from an employer of a number of them employment for other members of their organization who may be out of employment, although the effect will be to cause the discharge of other employees who are

not members. And whenever the courts can see that a refusal of members of an organization to work with non-members may be in the interest of the several members, they will not assume, in the absence of a finding to the contrary, that the object of such refusal was solely to gratify malice, and to inflict injury upon such non-members. A number of reasons for the action of the organization will at once suggest themselves in a case like this. . . . . And another most important reason is suggested by the fact that these particular organizations, associations of steamfitters, required every applicant for membership to pass an examination testing his competency. Now, one of the objections sometimes urged against labor organizations is that unskilful workmen receive as large compensation as those thoroughly competent. The examination required by the defendant associations tends to do away with the force of that objection as to them. And again, their restriction of membership to those who have stood a prescribed test must have the effect of securing careful as well as skilful associates in their work, and that is a matter of no small importance, in view of the state of the law, which absolves the master from liability for injuries sustained by a workman through the carelessness of a coemployee. I know that it is said that "workmen cannot dictate to employers how they shall carry on their business, nor whom they shall or shall not employ;" but I dissent absolutely from that proposition, and I assert that, so long as workmen must assume all the risk of injury that may come to them through the carelessness of coemployees, they have the moral and legal right to say that they will not work with certain men, and the employer must accept their dictation or go without their services.

As to the finding that

Cummings threatened to cause a general strike against the plaintiff association and against the plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where the men of the Enterprise Association were not employed, and that he and Defendant Nugent threatened to drive the plaintiff association out of existence,

the court states:

It will be found that it fairly means no more than that the defendant associations did not purpose to allow McQueed and the members of his association to work upon any jobs where members of defendant association were employed; that they were perfectly willing to allow them to have small jobs, fitted, perhaps, for men who were willing to work for small wages, but that the larger jobs, where they could afford to pay the rate of wages demanded by defendant associations, they intended to secure for their members alone — a determination to which they had a perfect right to come.

We can but wonder what becomes of McQueed's "probable expectancy" of an opportunity for employment under such rul-

ings, or by what right one man or set of men may assume to decide for other workmen what kind of jobs they are "perfectly willing for them to have." Indeed, the whole finding seems to be a reversion to

> "The simple plan
> That they should take who have the power
> And they should keep who can."

This opinion was concurred in by three of Judge Parker's associates, two others uniting with Judge Vann in a dissenting opinion. Though the minority opinion is not controlling in the state, it may be permissible to quote a paragraph or two therefrom, especially as the grounds taken therein are supported by numerous citations from cases and textbooks; while in the majority opinion, citations and references to authorities are formally dispensed with, and the precedents set by the English cases particularly cautioned against.

Speaking of the powers of labor organizations, after stating that to engage in "a peaceable and orderly strike, not to harm others, but to improve their own condition," is within their rights, Judge Vann said:

> They have the right to go farther, and to solicit and persuade others who do not belong to their organization, and are employed for no fixed period, to quit work also, unless the common employer of all assents to lawful conditions, designed to improve their material welfare. They have no right, however, through the exercise of coercion, to prevent others from working. When persuasion ends and pressure begins, the law is violated; for that is a trespass upon the rights of others and is expressly forbidden by statute. . . . . Their labor is their property, to do with as they choose; but the labor of others is their property, in turn, and is entitled to protection against wrongful interference. . . . .
>
> A combination of workmen to secure a lawful benefit to themselves should be distinguished from one to injure other workmen in their trade. Here we have a conspiracy to injure the plaintiffs in their business, as distinguished from a legitimate advancement of the defendant's own interests. While they had the right by fair persuasion to get the work of the plaintiff McQueed, for instance, they had no right, either by force or by threats, to prevent him from getting any work whatever, or to deprive him of the right to earn his living by plying his trade. By threatening to call a general strike of the related trades, the defendants forced the contractor to discharge competent workmen who wanted to work for him, and whom he wished to keep in his employment.

They conspired to do harm to the contractor in order to compel him to do harm to the plaintiffs, and their acts in execution of the conspiracy caused substantial damage to the members of the plaintiff corporation. While no physical force was used, the practical effect was that members of one labor organization drove the members of another labor organization out of business and deprived them of the right to labor at their chosen vocation.

It cannot be denied that the views expressed in the minority opinion are more in accordance with the general trend of legal decisions where these questions are involved than are those found in the conclusions of the majority; nor can it be anticipated, in the light of the decisions as to "closed shop" contracts, and the earlier holdings of this court itself, that a result which cannot be obtained by the orderly means of a mutual contract can finally be allowed to be procured by the coercion of sympathetic strikes, with the obvious purpose of monopolistic control, by the force of organization.

Somewhat of like nature with the above is the case of Plant v. Woods,[37] in which one union was seeking to disrupt another by procuring the discharge of such of the members of the latter as refused to join the former. The Massachusetts Supreme Court held that threats to institute boycotts and to cause "trouble in his business" to the employer who would not comply with the demands made were malicious and unlawful acts, unless there was justifiable cause. This the court failed to find in the purpose to force the plaintiffs to join the defendant association, saying that

the defendants might make such lawful rules as they please for the regulation of their own conduct, but they had no right to force other persons to join them. The necessity that the plaintiffs should join this association is not so great, nor its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful.

Chief Justice Holmes, now of the United States Supreme Bench, did not unite in the above views, taking a position quite similar to that of Judge Parker in the McQueed case, as will appear from the following quotation from his dissenting opinion:

[37] 57 N. E. Rep. 1011.

I agree that the conduct of defendants is actionable unless justified. I agree that the presence or absence of justification may depend upon the object of their conduct, that is, upon the motive with which they acted. . . . . To come directly to the point, the issue is narrowed down to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in that I think that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. . . . . I think it lawful for a body of workmen to try by combination to get more than they now are getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike.

It may be observed in passing that whatever liberty is allowed the striker in determining his own attitude toward a given opportunity for employment, the assumption by Judge Holmes that threats made for the direct purpose of procuring higher wages would be justified by the object, is not borne out by the earlier Massachusetts case of Vegelahn v. Guntner,[38] in which also he occupied a dissenting position. In this case the court held that the maintenance of a patrol was not justifiable on the ground that the defendants were only seeking to secure better wages for themselves by compelling the plaintiff to accept their schedule of wages.

A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts, expressly directed to another, by way of intimidation or constraint either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful.

But these considerations encroach upon another phase of the question, which is discussed somewhat in a later portion of this paper.

It has happened that the defense offered for acts which made the person committing them liable in damages to an injured person was that the acts complained of were done in conformity to rules or instructions of the union. Thus, in the case of Gatzow v.

[38] 44 N. E. Rep. 1077.

Buening,[39] the latter, as secretary of a Liverymen's Association, ordered the hearse and carriages hired for attendance at the funeral of Gatzow's child to be driven away from the house just before the time when they would be needed for the journey to the cemetery, because the undertaker employed was not in the union—a fact which, under the rules of the union, made it improper for the members to serve. Buening claimed that in ordering the vehicles away he was but performing his duty under the rules, but, the fact of damages and of an agreement or conspiracy having been proven, such a claim was not admitted as a defense, and Buening was held to a personal liability.

That obedience to rules is not only not a defense, but that it may even form the gist of an offense, appears in the case of Boutwell v. Marr.[40] In this case there was an admitted agreement, under penalty, to refuse to trade with a designated person, and the acts of the members of an association, done in accordance with such an agreement, though each merely withholding his own patronage, were held not to be voluntary or individual acts, although each member may have joined the association voluntarily. The court says:

> It may be true that if the defendants, acting independently of any organization, and moved solely by similarity of interest and views, had united in withdrawing their patronage, the effect upon the plaintiff's business would have been the same, and yet the defendants have incurred no liability. But, in the case supposed, the united action would result from the free exercise of individual choice. It will be seen upon further inquiry that this cannot be said of the action of an organization like that of the defendants. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion. In this case it could easily be found that a fine of fifty dollars for a violation of the rules was not intended to be applied to rules adopted to secure a performance of the ordinary duties of membership. If in fact designed to hold unwilling members to unity of action in any aggressive movement of an unlawful character, the defendants cannot complain if the law so treats it. The fact that the members of the association voluntarily assumed its obligations in the first instance, so far as it is a fact, is not controlling. The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken.

[39] 81 N. W. Rep. 1003. [40] 42 Atl. Rep. 607.

In a case (Martell v. White),[41] practically identical in circumstances and principles with the above, involving a voluntary association of granite manufacturers in the state of Massachusetts, the Supreme Court of that state quotes with approval from the opinion in Boutwell v. Marr, and speaks of the adoption of the system of forced contributions as a penalty for trading with proscribed persons, as a method of fining for the purposes of coercion which is

> arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based.

Such regulations differ in no fundamental respect from the penalizing by-laws of labor organizations, forbidding, for instance, the members of a union to work on the same job with nonunion men, under penalty of a forfeiture of ten dollars, as is prescribed by the Bricklayers' Union of the District of Columbia. Of such coercive fines it may be said, as was said in one of the above cases, that the "voluntary acceptance of by-laws providing for their imposition does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threats of suits upon groundless claims."

Indeed, to allow the validity of such provisions would amount to a turning over of the whole ordering of industrial society to a regulation by the rules and resolutions of the various classes of organizations, and the enforcement of "unauthorized mandates" by means which the law neither contemplates nor allows. In the light of these opinions, we may call to mind again the conflicting rulings of Judges Parker and Vann in the Steamfitters' Case, and, applying these principles to the question of the calling off of associated trades, obligated as they were under a heavy penalty to obey such a call, consider whether the obedience rendered can be held to have been voluntary, or whether it would not rather come under the head of an "arbitrary and artificial" compulsion, which the courts would not only not enforce, but which they would

[41] 69 W. E. Rep. 1085.

instead condemn. Recourse to the courts for the recovery of such a penalty is, of course, hardly to be expected, since a forfeiture of membership is, in most cases at least, a more dreaded punishment, and one that is in the hands of the organization; but if the disposition to excuse labor organizations from certain restrictions applied to trusts and monopolistic undertakings could be left out of the reckoning, we should have to say that if the question of voluntary or coerced action became vital in any case, we had here the rule from which it must be concluded that the adoption of the system of heavy penalties removed the organization by so much from the realm of the voluntary association and gave to it the nature of a governmental system.

The experience of the union with injunctions has been quite extensive, but it has generally been the case that the union was defendant, undertaking to prevent the issue of any restraining order. In Atkins v. Fletcher,[42] however — a case which was before the Court of Chancery of New Jersey in the autumn of 1903 — we find a veritable turning of the tables attempted. In this case an association of machinists, whose members were at the time on strike, prayed for an injunction against their former employers to prevent the interference of said employers with the rights of certain persons employed and paid by the International Association of Machinists to act as pickets near and about the works of the Fletcher Company. The bill alleged that "many of the complainants have been so employed during said strike, and that they or most of them have been compelled to give up such employment by reason of the annoyance, insults, violence," etc., to which they have been subjected by the company and its employees. This complaint has a very familiar sound to anyone who has read the prayers for injunctions against strikers interfering with the employment of labor by employers whose business is interrupted by acts described in the same or similar language. Vice-Chancellor Stevenson, of the New Jersey Court of Chancery, before whom the case was heard, recognized the claims as similar, but held that the right of voluntary associates to freedom in the labor market so that they could readily employ agents to carry on

[42] 55 Atl. Rep. 1074.

their side of the industrial war, whether engaged in supporting or in resisting a strike, had never been recognized as a proper subject of protection by means of an injunction; and further, that the question, if any, was one of damages, and not to be met by an injunction, inasmuch as it did not appear that the complainants were likely to suffer great or irreparable loss if the acts complained of were allowed to continue; nor did it appear but that the parties complained against were solvent, and that any damages which might accrue to complainants could be collected on a judgment properly obtained.

The same court had recently to pass upon another claim of a union in a case in which an association of musicians sought to secure an injunction against the organization of a rival union under a charter granted by the American Federation of Musicians.[43] The association first mentioned had held a charter from the federation, which was afterward revoked for non-compliance with an order of the executive officer in charge of the district. The decision revoking the charter was not appealed from, but was, at the hearing of the case, declared by the plaintiffs to be illegal. The petitioners claimed that the charter conferred a valuable property right, that right being the exclusive privilege of membership in the federation within a certain district, and the right to use the name of the association. In the absence of funds or other holdings, Vice-Chancellor Emory ruled that the relations were only personal and voluntary, and not enforcible in a court of equity; and that the claim to exclusive membership and the right to use the name could not be recognized by a court, as to do so would give a legal sanction to the claims of the association to a monopoly, within the district named, of all rights of employment in that particular occupation.

The mere fact of organization, then, is not sufficient to support claims of interest as an employer; nor is the loss of a really valuable prerogative — valuable by reason of those influences which enforce the employment of union members only, but which depends upon the maintenance of voluntary relations — ground for legal interference, because such action would encourage

[43] O'Brien v. Musical, etc., Union, 54 Atl. Rep. 150.

restraint of trade, although in both cases the interests of the organizations, as conceived by their members, were actually jeopardized.

On the other hand, however, where the right of membership in a union could be shown to involve substantial interests, as where there is an accumulated fund,[44] or the tools of members are held by the union for the common use of its members,[45] the courts have entertained the complaints of persons claiming to be unjustly deprived of their rights of membership, and have ordered the restoration of such claimants to their standing in the organization; though it must be conceded that the cases referred to throw but little light on the subject of the value attached by the court to the mere fact of membership in the unions, as the cases were capable of settlement on a consideration of other conditions.

There was before the same court, and at the same time that the case of Atkins v. Fletcher, noted above, was being considered, a suit by the Fletcher Company to restrain picketing of whatever kind, an injunction to that effect being asked for against the International Association of Machinists.[46] This Vice-Chancellor Stevenson refused to grant, holding that a picketing carried on for the mere purpose of obtaining information and of carrying information to or persuading workmen willing to be approached, and not involving the disruption of contracts, called for no interference from a court of equity. Other recent decisions have discountenanced picketing altogether. Judge Wing, of the Northern District of Ohio, in a suit to restrain picketing by an iron-molders' union,[47] said:

> Whether this picketing has been accompanied by violence or not, we need not consider. This system, constantly kept up, in its nature leads to disturbance, and has a tendency to intimidate. That it is used by the defendants as a means of enforcing their unauthorized mandates, and that it accompanies the utterance of them, is an admission by the defendants that it will prove effective in enforcing these mandates. It is therefore a violation of the rights

[44] Weiss v. Musical Mutual Protective Union, 42 Atl. Rep. 118.

[45] Cotton Jammers' etc., Association No. 2 v. Taylor, 56 S. W. Rep. 553.

[46] Fletcher Co. v. International Association of Machinists, 55 Atl. Rep. 1077.

[47] Otis Steel Co. Limited v. Local Union of Iron Molders, No. 218, 110 Fed. Rep. 698.

of this complainant, and of all nonunion men, or of any and all men who choose to work in disobedience to the orders of this defendant union. It is unlawful for any man to dictate to another what his conduct shall be, and to attempt to enforce such dictation by any form of undue pressure. Nor must intimidation be disguised in the assumed character of persuasion. Persuasion too emphatic, or too long and persistently continued, may itself become a nuisance, and its use a form of unlawful coercion.

The object of the union's action in any such case is, of course, to prevent the employment of other workmen to take the vacated places, to the end that the employer may be forced to treat with the striking workmen and reinstate them on the desired conditions. The basis of this action is obviously the idea contended for by the unions that the employee has an economic interest, amounting in effect to a property right, in the business of his employer, so that he may assume not only to pass upon the conditions of his individual service and that of his associates, but also to control as "his" the place left vacant by him when he went on strike. Approximately this idea has received some recognition in Germany, but it cannot be said to have a legal standing in this country, as the prerequisite in most, if not all, arbitration proceedings is the resumption of the relations of employer and employee, if disrupted, and the continuance of such relations during the proceedings. Apropos of this point it has been said[48] that

the notion seems to prevail among a large number of the laboring class that, if they quit work because of unsatisfactory conditions, those who take the places vacated are doing a wrong, an injustice, to the families and persons of those who quit. Whatever force there may be, if any, to this proposition from the ethical standpoint of the laborer, it has no legal support. If A, for the welfare of himself and family, leaves an employment, and B, seeking the welfare of himself and family, takes the place voluntarily vacated by A, no legal wrong has been done A; and the court, being no respecter of persons, will protect the rights of B as fully as those of A.

Perhaps no better summing up of the present status of this and the related questions can be presented by way of conclusion than that found in an opinion handed down last year by Judge McPherson, in a case before the United States Circuit Court for the District of Nebraska, in which he reviewed the subject of strikes,

[48] Union Pacific Railway Co. v. Ruef, 120 Fed. Rep. 102.

picketing, and the injunction at considerable length.[49] The defendants were members of a union which had undertaken to compel the Union Pacific Railway Company to "come to the International Union" to procure machinists to do its work in its shops at Omaha, and had announced this purpose as the object of their system of picketing, against which an injunction was sought. The judge's conclusions of law were in the form of propositions, which read in part as follows:

1. The defendants acted within their right when they went out on a strike. Whether with good cause, or without any cause or reason, they had the right to quit work, and their reasons for quitting work were reasons they need not give to anyone. And that they all went out in a body, by agreement or preconcerted arrangement, does not militate against them or affect this case in any way.

2. Such rights are reciprocal, and the company had the right to discharge any or all of the defendants, with or without cause, and it cannot be inquired into as to what the cause was.

4. The defendants have the right to combine and work together in whatsoever way they believe will increase their earnings, shorten their hours, lessen their labor, or better their condition, and it is for them, and them only, to say whether they will work by the day or by piece work. All such is part of their liberty. And they can so conclude as individuals, or as organizations, or as unions.

6. When the defendants went on a strike, or when put out on a lockout, their relations with the company were at an end: they were no longer employees of the company; and the places they once occupied in the shops were no longer their places, and never can be again, excepting by mutual agreement between the defendants and the company.

7. No one of the defendants can be compelled by any law, or by any order of any court, to again work for the company on any terms or under any conditions.

8. The company cannot be compelled to employ again any of defendants, or any other persons, by any law, or by any order of any court, or on any terms, or under any conditions.

11. Defendants have the right to argue or discuss with the new employees the question whether the new employees should work for the company. They have the right to persuade them if they can. But in presenting the matter they have no right to use force or violence. They have no right to terrorize or intimidate the new employees. The new employees have the right to come and go as they please, without fear or molestation, and without being compelled to discuss this or any other question, and without being guarded or picketed;

[49] *Ibid.*

and persistent and continued and objectionable persuasion by numbers is of itself intimidating, and not allowable.

12. Picketing in proximity to the shops or elsewhere on the streets of the city, if in fact it annoys or intimidates the new employees, is not allowable. The streets are for public use, and the new employee has the same right, neither more or less, to go back and forth, freely and without molestation, and without being harassed by so-called arguments, and without being picketed, as has a defendant or other person. In short, the rights of all parties are one and the same.

The position of Vice-Chancellor Stevenson cannot be said to be opposed to the conclusions just announced; and, doubtless, the legality of picketing with the simple purpose of procuring information, in the absence of any such prohibitive statute as that of Alabama noted above, would not generally be denied, though the proceeding was spoken of in a recent case as "an injurious interference in a matter in which the pickets (striking employees) had no rightful concern, and being therefore unlawful."[50] Indeed, any picketing that accomplishes the results usually aimed at must go farther than the mere securing of information, and when effective interference is observable, the picket as a tangible feature of union activities pretty generally comes under the ban of the courts.

It cannot escape observation, whether from a perusal of the above account or from a wider observation of the subject, that there is as yet much legislation that can appropriately be called experimental, and that the courts are neither exact nor harmonious in their rulings as to the rights of labor organizations and the limitations to be put upon their activities. Experience will not allow us to conclude that there will not be duplication in various states of just such enactments as have been held in others to be violative of fixed constitutional principles, but it is safe to predict that such findings will have a gradually increasing effect. Thus, in Illinois, after the decision declaring unconstitutional the law establishing free public employment bureaus, because the statute provided that employers whose employees were on strike should not be allowed to receive applications for employment through that agency, the legislature promptly re-enacted the law providing

[50] Knudsen v. Benn, 123 Fed. Rep. 636.

for the valuable public service of the free employment agency, omitting the section found unconstitutional. So, doubtless, to other states the effect of statutory construction will extend, just as has the influence of statutory enactment; while the logical development of such a fundamental principle as the doctrine of "probable expectancies" and of accurate distinctions between voluntary and quasi-governmentally enforced activities will tend to settle and clarify the lines of procedure for courts of equity, resulting in the gradual determination of a fixed and tolerably uniform status of organized labor in the various states of the Union.

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